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No. _____

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1989

**SHEARSON LEHMAN/AMERICAN EXPRESS, INC. and RAYMOND R. CLEMENTS,**
*Petitioners,*

v.

**FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,**
*Respondents.*

## BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Whether participants in a qualified Employee Retirement Income Security Act of 1974 (ERISA) plan may be compelled to arbitrate claims of statutory violations asserted against a plan fiduciary, where a provision in an agreement between the employer and a plan fiduciary calls for compulsory arbitration of all claims.

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## STATEMENT OF THE CASE

The plaintiffs accept the defendants' statement of the facts, except to the extent that it implies that plaintiff Joan Shea had contractually agreed with the defendants to an arbitral forum for the resolution of her ERISA or any other claims, and that plaintiff Frank L. Bird had agreed to arbitrate all of the disputes between the parties. The plaintiffs state that Joan Shea was not a signatory or party to the agreement, but merely an employee participant in the plan, and that plaintiff Frank L. Bird as Trustee signed a standard form customer agreement which contained the arbitration language quoted by the petitioners.

## REASONS FOR DENYING THE WRIT

The Court should deny the writ in this case because the issues in this case have not been sufficiently developed at this time. Petitioners in their brief cite only two appellate level cases related to the issues currently before this Court. Given this short and premature history it would be unwise for the Court to consider the merits of this controversy at this time. The premature nature of this petition is further illustrated by the lack of any substantial published legal scholarship addressing the specific issues giving rise to the Petitioners' request.

While the petitioners cite the recent decisions of this Court in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) as evidence of a fully-developed controversy concerning compulsory arbitration of claims based on violations of securities laws, it is respectfully submitted that these cases do not directly bear on the issues before the courts below in this matter. While it is true that the controversy surrounding compulsory arbitration of claims based on violations of the Securities Acts of 1933 and 1934 had been well developed by the time the Court decided the *McMahon* and *Rodriguez* cases, it is not true that the controversy surrounding compulsory arbitration of claims based on violations of ERISA has been fully developed.

The importance of allowing full development of issues through a case-by-case approach is at the very heart of the American legal system. This traditional approach to legal reasoning is well illustrated by the long line of cases interpreting the Federal Arbitration Act, and its application to various circumstances. Beginning with *Wilko v. Swan*, 346 U.S. 427 (1953) the Court has consistently found that Congress has the authority to explicitly or implicitly override the Federal Arbitration Act. Consistently, this Court and the lower courts following this Court's decisions have held that one could not be compelled to arbitrate claims where statutory language specifically prohibited such compulsion, where

the legislative history of an act prohibited such compulsion, or where the fundamental goals and purposes of an act were inconsistent with compulsory arbitration.

In reviewing the decision of the United States District Court for the District of Connecticut in the case below the United States Court of Appeals for the Second Circuit applied the appropriate legal standard. The court found that the legislative history and specific provisions of ERISA indicated a Congressional intent to exempt certain ERISA-based claims from compulsory arbitration. Additionally, the court below found the goals and objectives of ERISA inconsistent with Petitioners' request to compel arbitration of all ERISA-based claims through a blanket, pre-dispute, standardized arbitration clause in a contract of adhesion. The court found that ERISA's goal of protection of employee rights and development of a uniform Federal common law of employee benefits were thus inconsistent with compulsory arbitration provisions of agreements such as the one at issue in the case below. Similarly, Judge Gibson's dissent in *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), also points to the incompatibility of the fiduciary responsibilities under ERISA and compulsory arbitration clauses in contracts of adhesion.

## I. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE ISSUES SURROUNDING THE CONTROVERSY AT ISSUE IN THE CASE BELOW HAVE NOT BEEN FULLY DEVELOPED AT THIS TIME. THUS, CONSIDERATION OF THESE ISSUES WOULD BE AN IMPRUDENT UTILIZATION OF THE COURT'S VALUABLE RESOURCES.

At the present time very few courts have considered the issue of compulsory arbitration of ERISA-based claims of statutory violations. Petitioners in their brief requesting certiorari cite only two appellate court cases dealing directly with the issues presented in the case below, *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988), and *Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292 (2d Cir. 1989). While these two cases are important cases and

worthy of public debate and discussion, they do not represent a significant conflict between United States Circuit Courts of Appeal.

The Respondents respectfully submit that *Sulit* and *Bird* do not represent a significant conflict due to the differences in both the factual circumstances of the cases, and the legal theories argued in the cases. In *Sulit* the court was faced with a set of facts where only plan fiduciaries and signatories to the arbitration agreement were parties to the litigation. In contrast to *Sulit, Bird* is a case in which all parties are not signatories to the agreement between the plan's sponsoring employer, and the plan fiduciary. Furthermore, *Sulit* was argued on the basis of 29 U.S.C. § 1110(a), the waiver provisions of ERISA, which are very similar to the waiver provisions found in the Securities Act of 1933, and the Securities Exchange Act of 1934; *Bird* by contrast was not argued on the basis of the waiver provision alone, but was argued based on the legislative history, general text of the statute and the fundamental purposes of the act.

In *Sulit* the United States Court of Appeals for the Eighth Circuit reviewed an opinion of the District Court which was based strictly on the argument that 29 U.S.C. § 1110(a) bars enforcement of agreements to require arbitration. *Sulit,* 847 F.2d 475, 477. The Eighth Circuit's opinion in *Sulit* also specifically recognized that the Plaintiff below, Sulit, had not argued, nor had he relied upon, ERISA's legislative history to support his claim of preemption of the Federal Arbitration Act by ERISA. *Sulit,* 847 F.2d 475, 478 (8th Cir. 1988). The United States Court of Appeals for the Second Circuit specifically recognized the limited nature of the *Sulit* opinion in footnote eight of its opinion, and further held that, based on its analysis of the entire text of ERISA, the legislative history supporting ERISA legislation, and the fundamental purposes of the act, Congress had intended to preclude enforcement of agreements to require arbitration of the fiduciary responsibility requirements of ERISA. *Bird v. Shearson Lehman/American Express, Inc.,* 817 F.2d 292 (2d Cir. 1989).

Balancing the interests of all of the parties to a controversy is something which United States courts are uniquely qualified to do, and something which they are specifically charged with the responsibility for in our system of government. In the two cases which Petitioners cite as conflicting, the courts below were simply faced with a different mix of parties, facts, and legal theories; hence, it is not surprising that different factors were given different weights and a subtle balance between the interests was struck. Respondents submit that this balancing process works best on a case-by-case basis, in which all interested parties are fully represented and all legal arguments are fully developed. In this process a logical set of rules will evolve from the balancing of these interests and a fully-developed record of case law will be developed to assist the decision-making process.

The development of this case-by-case approach to the development of legal rules is at the heart of traditional common law legal systems, and represents precisely what Congress intended in ERISA, 29 U.S.C. § 1144, when Congress established that a fundamental purpose of ERISA was to develop a "Federal Common Law" of employee benefits. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983). Currently, only a small fraction of all factual patterns have been considered and argued. Thus, a decision to grant certiorari in this matter, coupled with the type of broad sweeping decision on the merits sought by the Petitioners in the Question Presented would prematurely arrest the development of the law in this area.

Contrary to the Petitioners' assertions, the conflict between the circuits is not fully developed, and courts do not, as the Petitioners argue, either apply the Court's rationale in *McMahon* and *Rodriguez* to ERISA claims, or refuse to apply the Court's rulings in *McMahon* and *Rodriguez* to ERISA claims. The Second Circuit's opinion in *Bird* clearly recognizes and applies the proper legal standard set forth in *McMahon*. *Bird v. Shearson Lehman/American Express, Inc.*, 817 F.2d 292. In applying that standard the court found

that Congress had intended to preempt the Federal Arbitration Act and that the fundamental purposes of ERISA were inconsistent with compulsory arbitration of statutory claims based on violations of ERISA fiduciary responsibility provisions.

While it is true that in the *Bird* case below the Second Circuit reached a conclusion that results in a different outcome from the outcome of the *Sulit* case argued before the Eighth Circuit, it is also true that the Second Circuit in *Bird* applied the correct legal standard to a different factual situation that had produced different legal arguments. Thus, the Second Circuit had a record before it that more clearly linked the labor and employment law history of ERISA to the facts before the court. Based on this record the Second Circuit correctly analyzed the legislative text, legislative history, and the objectives of ERISA in the light of the Court's recent rulings concerning compulsory arbitration.

## II. PETITIONERS' ARGUMENT THAT GRANTING OF CERTIORARI IN THIS CASE WILL ENABLE THE COURT TO SETTLE ISSUES CONCERNING COMPULSORY ARBITRATION OF CLAIMS UNDER OTHER STATUTORY PROVISIONS AMOUNTS TO A REQUEST FOR AN ADVISORY OPINION IN VIOLATION OF ESTABLISHED RULES.

The distinctions discussed above emphasize the importance of having a complete record. A court is not a legislative body, and thus courts should not provide advisory opinions or opinions based on a record that is incomplete. The Petitioners argue that if the Court takes this case it will have the opportunity to guide the lower courts in their handling of other statutes as these statutes relate to the Federal Arbitration Act. Respondents respectfully submit that this Court should not engage in this type of speculative advisory process. Courts are uniquely established to resolve fully-developed conflicts between adversary parties based on a full and complete record; courts are not legislative bodies with wholesale law-making authority.

Clearly, the case before the Court does not present an adequate record to allow the Court to address the sweeping question of compulsory arbitration of all types of statutory ERISA claims in all contexts as requested by the Petitioners. Therefore, Respondents respectfully submit that this request amounts to a request for an advisory opinion in violation of justiciability requirements for Article III courts. Wright has written that: "Yet the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions . . ." Wright, *Law of Federal Courts;* See also *U.S. v. Fruehauf,* 365 U.S. 146 (1961), *Aetna Life Insurance v. Haworth,* 300 U.S. 227 (1937).

Consistently, this Court has held that the enforcement of agreements to arbitrate disputes arising under federal statutory provisions is to be determined by discerning Congress' intent to override the Federal Arbitration Act as evidenced in the text of the statute giving rise to the action, the legislative history of the statute, or from the statute's underlying purposes. *Rodriguez De Quijas v. Shearson/American Express, Inc.,* 109 S.Ct. 1917 (1989), *Shearson/American Express v. McMahon,* 482 U.S. 220 (1987). Thus, the underlying principle of *Rodriguez* and *McMahon* is consistent with the guidelines developed in *Wilko,* and the long history in case-by-case, statute-by-statute determination of which statutory claims are exempt from enforcement of arbitration agreements. Illustrations of this Court's rulings on such matters are found in *McDonald v. City of West Branch, Michigan,* 466 U.S. 284 (1984), and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). In each of these cases this Court, applying the same legal principles outlined in *Rodriguez* and *McMahon,* found that Congress had in fact intended to override the applicability of the Federal Arbitration Act. Similarly, the Courts of Appeal have woven threads into this continuous fabric of case law. *Barrowclough v. Kidder, Peabody & Co., Inc.,* 752 F.2d 923 (3rd Cir. 1985), *Amaro v. Continental Can Company,* 724 F.2d 747 (9th Cir. 1984), *American Safety Equipment Corp. v. J.P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968).

In order to support their request for a broad-ranging review of the enforcement of arbitration agreements under any provision of ERISA the Petitioners note that some 6,704 claims based on some aspect of ERISA were filed in Federal District Courts during the reporting year ending in June of 1988. The filing of these suits illustrates that Congress's intention in ERISA to establish a "Federal Common Law" of employee benefits is being followed by the courts, employee benefit plan fiduciaries, and plan participants. Hence, establishing a rule that participants and employees who are the victims of ERISA statutory violations may be compelled to arbitrate claims based on statutory violations will preclude federal courts from developing a "Federal Common Law" of employee benefits. Thus, Respondents respectfully submit that 6,704 suits filed in Federal District Courts simply illustrate that the system is working precisely as Congress intended.

Respondents do not dispute that 6,704 ERISA claims were filed. However, Respondents do respectfully argue that only some unknown fraction of these claims are directly relevant to the issues developed in the record below. Petitioners' implied claim that a decision in this case will significantly impact caseloads is not supported by any credible data that breaks out the distribution of filings by type of action. While it appears to be true that in the post-*McMahon* era almost 100 percent of all brokerage contracts require compulsory arbitration clauses, it is not clear that non-brokerage house-managed employee benefit or employee welfare plans have similar provisions. Thus, given that brokerage firms handle only a small portion of some types of ERISA plans, only a very small portion of the 6,704 filings may prove to be directly related to the issues raised in this case.

Furthermore, the Court may find it imprudent to intervene in the regulation of brokerage contracts at this time. Recently, several states have established regulations that prohibit compulsory arbitration clauses of the type at issue in

this case.[1] Additionally, legislation has been introduced in Congress to modify securities arbitration, and to control the power of brokerage firms to compel compulsory arbitration clauses in contracts of adhesion with their clients.[2] The Securities Industry Association has also recently established new guidelines concerning compulsory arbitration provisions, and it has also published a new model customer agreement which incorporates numerous changes to the standard arbitration clause at issue before the courts below.[3] Lastly, the Securities and Exchange Commission, the New York Stock Exchange, the National Association of Securities Dealers, the Securities Industry Conference on Arbitration, and the North American Securities Administrators Association have worked to establish significant changes to the regulations concerning compulsory pre-dispute arbitration agreements of the type before the courts below.[4] Therefore, Respondents respectfully submit that regulatory changes have essentially mooted the securities regulatory policy issues raised before the courts below in this case. Hence, Respondents submit that the Court should not grant certiorari in this case as it addresses issues that have been resolved by other branches of government, and thus it does not raise issues which merit attention by this Court.

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[1] Massachusetts, California, and New Mexico have established regulations that prohibit such regulations. See: *Shepherd*, "Investor Protection and the Arbitrability of Securities Disputes After *Shearson/American Express, Inc. v. McMahon:* Legislative and Judicial Reaction," 25 Willamette L. Rev. 599.

[2] *Id.* at 619–627.

[3] *Securities Week*, McGraw-Hill, July 17, 1989.

[4] 54 Fed. Reg. 21,144 (May 16, 1989). See also: *[Current Developments]* Fed. Sec. L. Rep. (CCH) 80,099.

## III. PETITIONERS ARGUE THAT ALLOWING PLAINTIFFS TO MAINTAIN SEPARATE ACTIONS IN BOTH ARBITRATION AND THE COURTS BELOW WOULD AMOUNT TO AN IMPROPER WASTE OF JUDICIAL RESOURCES.

Respondents concede that prosecuting both the securities claims in arbitration and the ERISA claims in federal court will entail some duplication. However, mere duplication is not adequate grounds for denying the Plaintiff access to federal courts. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). This general rule has been followed by numerous lower federal courts in dealing with similar issues such as exhaustion of internal plan remedies in the context of employee benefit plans under ERISA. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). Consistently the courts have held that mere duplication alone is inadequate to bar the Plaintiff from her right to pursue her remedies in federal court.

## CONCLUSION

Respondents submit that Petitioners' petition for a writ of certiorari should be denied because: (1) The apparent conflict between the circuits is not a significant conflict, (2) The broadly stated question presented by Petitioners requests an advisory opinion because it raises issues not argued before the trial court, or the United States Court of Appeals for the Second Circuit, (3) The public policy issues in this case have become moot due to the Securities and Exchange Commission's revised regulations which substantially change arbitration clauses allowed in brokerage contracts, and (4) There is no conflict alleged or reported between or among any group of the Circuit Courts of Appeal regarding the ruling below allowing Respondents, Plaintiffs below, to proceed simultaneously with both the ERISA claims in federal court and the securities claims in arbitration. For all of the foregoing reasons, Respondents respectfully request the Court to deny the Petitioners' request for a writ of certiorari.

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